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No. 85-891

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROGER C. SMITH, ETC., ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (UNITED STATES OF AMERICA, REAL PARTY IN INTEREST)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In this wrongful death action, petitioner contends that the court of appeals erred in letting stand the district court's order transferring the case pursuant to 28 U.S.C. 1404(a).

1. On December 20, 1982, petitioner's daughter and two grandchildren died as a result of injuries sustained in a fire that occurred in their military housing at Fort Hood, Texas. Two years later, petitioner filed the instant action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the Western District of Washington, the district where he lives.

Pursuant to 28 U.S.C. 1404(a), the United States moved to transfer the case to the Western District of Texas. In support of this motion, the government filed an affidavit

(Pet. App. A8-A12) stating why transfer was warranted for the convenience of the parties and witnesses and in the interest of justice. Specifically, the affidavit stated: (1) the accident giving rise to the action occurred in the Western District of Texas, and no operative events pertaining to the action occurred in Washington; (2) resolution of the case would require the application of Texas law; (3) the majority of the government's material witnesses would not be amenable to service of process in the Western District of Washington, but would be amenable to process in the Western District of Texas, and all of them lived much closer to Texas than Washington; (4) both parties would be able to compel the attendance of witnesses in the Western District of Texas; and (5) trial of the action in the Western District of Washington would be excessively expensive and burdensome to the United States. The district court granted the government's motion on February 7, 1985 (*id.* at A1-A2).

Petitioner then filed a notice of appeal, a petition seeking permission to appeal the district court's interlocutory order pursuant to 28 U.S.C. 1292(b), and a petition for a writ of mandamus. The court of appeals denied relief. The court summarily dismissed petitioner's appeal for lack of jurisdiction, citing *Varsic* v. *United States District Court,* 607 F.2d 245 (9th Cir. 1979) (Pet. App. A3), and held without elaboration that "[t]he district court did not abuse its discretion in granting the motion to transfer" (*id.* at A4-A5).

2. Petitioner contends that the court of appeals erred in refusing to set aside the district court's order transferring this case to the Western District of Texas. This factbound claim does not merit this Court's review. In any event, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

Petitioner argues that the district court should have required the government to make a more elaborate showing

that the transfer was justified. This is a curious argument given that 28 U.S.C. 1404(a) requires no showing by either party and, indeed, on its face allows sua sponte transfers.[1] In any event, the district court had before it the government's motion for transfer, supported by affidavit, as well as petitioner's opposition thereto, also accompanied by affidavits, and "the entirety of the records and file" in the case (Pet. App. A1). There was ample support in those materials—involving, as discussed earlier, not only convenience for witnesses but other factors as well—to sustain the district court's decision to grant the transfer. The court of appeals properly found no abuse of discretion in the district court's decision and, accordingly, denied petitioner's appeal and application for a writ of mandamus.

a. The court of appeals' disposition of petitioner's appeal is in accord with settled law. It is well established that orders respecting venue entered under Section 1404(a) are interlocutory in character and are nonappealable as of right prior to final judgment. See, *e.g.*, *Pacific Car & Foundry Co.* v. *Pence*, 403 F.2d 949, 951 (9th Cir. 1968) (collecting cases).[2] It is true that when a controlling question of law is involved the district court may certify a transfer order for review under 28 U.S.C. 1292(b) and, upon certification,[3] the appellate court may in its discretion permit an appeal. But a party has no right to demand that a court authorize

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[1]See, *e.g.*, *I-T-E Circuit Breaker Co.* v. *Becker*, 343 F.2d 361, 363 (8th Cir. 1965); *Stanley Works* v. *Globemaster, Inc.*, 400 F. Supp. 1325, 1338-1339 (D. Mass. 1975); *Kearney & Trecker Corp.* v. *Cincinnati Milling Machine Co.*, 254 F. Supp. 130, 133-134 (N.D. Ill. 1966).

[2]See also 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, *Moore's Federal Practice* ¶ 0.147, at 1694-1695 (1985) (collecting cases) [hereinafter cited as *Moore's Federal Practice*]; 9 *id.* at ¶ 110.13[6], at 173-174; 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3855, at 301 (1976 & Supp. 1985) (collecting cases).

[3]This certification was apparently never made in this case. See Appellant's Br. 3.

appeal under Section 1292(b). The issue petitioner presented was hardly a "controlling question of law * * * advanc[ing] the ultimate termination of the litigation." To the contrary, it merely involved application of the discretionary standard of Section 1404(a) to the particular facts of this case.

b. Petitioner also contends that the court of appeals should have granted a writ of mandamus. In the transfer order context, however, this Court has held that "[t]he supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is a clear abuse of discretion or 'usurpation of judicial power.' " *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953) (denying mandamus to override 28 U.S.C. 1406(a) transfer order) (quoting *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212, 217 (1945)). While the courts of appeals may differ as to what constitutes an "exceptional case," they all have been extremely chary of finding an abuse of discretion.[4]

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[4]See 1 *Moore's Federal Practice* ¶ 0.147, at 1708 (footnote omitted) ("As a practical matter, while the views of the circuits differ [regarding appellate review of transfer orders], on the whole the net results are similar. All circuits have been extremely reluctant to find an abuse of discretion by the district court, and thus in the great bulk of cases involving district court discretion the prerogative writ has been dismissed or denied"); 9 *id.* at ¶ 110.13[6], at 175. Indeed, while petitioner struggles to show that there is a difference in the circuits' willingness to grant writs of mandamus to override transfer orders, he demonstrates principally that it is very difficult to succeed anywhere and that, by his own account, he lost in a circuit with a relatively liberal standard. See *Pacific Car & Foundry Co.* v. *Pence, supra; Varsic* v. *United States District Court*, 607 F.2d 245, 251-252 (9th Cir. 1979) (one of the few cases where mandamus has been granted to override a transfer order, there under 28 U.S.C. 1406(a)).

Petitioner also seems (Pet. 19-22, 26-29) to assert a due process right to appellate review of transfer orders. He gives no basis for this assertion, however.

Here, moreover, the court of appeals said explicitly that the district court had not abused its discretion (Pet. App. A4-A5). Under the circumstances of this case, then, no court would have granted a writ of mandamus.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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